No. 90-6352

In the Supreme Court of the United States

OCTOBER TERM, 1990

DIANE GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a conviction for a multiple-object conspiracy must be set aside when the jury returns a general verdict of guilty and the evidence is insufficient to support one of the objects of the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (J.A. 54-118) is reported at 913 F.2d 337.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1990. The petition for a writ of certiorari was filed on November 27, 1990, and granted on February 19, 1991. J.A. 119. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 371 of Title 18 of the United States Code provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to

defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. She received a suspended sentence and was placed on probation for five years on condition that she participate in a work release program for the first six months of her probation, obtain and maintain employment, and perform 500 hours of community service. The court of appeals affirmed. J.A. 54-118.

1. Petitioner's conviction stems from her involvement with narcotics distributor Alex Beverly. The evidence at trial showed that from 1980 to 1986, Beverly controlled a large narcotics operation in Chicago, Illinois. Beverly purchased cocaine and heroin from importers and (with the help of George Brown, Betty McNulty, and others) distributed it through several gambling establishments and lounges that he owned or controlled. He used the profits to purchase real and personal property, which he frequently placed in the names of other persons, including Betty McNulty and petitioner. J.A. 55-71.

In 1988, a grand jury returned a 23-count indictment against Beverly, George Brown, Betty McNulty, petitioner, and other individuals arising from Beverly's drug operation and his attempts to conceal assets and income. J.A. 2-30. The indictment charged Beverly with managing a continuing crim-

inal enterprise, and it charged Beverly, Brown, McNulty, and others with conspiracy to violate, and violation of, various narcotics statutes and related laws. J.A. 2-17, 25-26. Most pertinent to this case, Count 20 of the indictment alleged that Beverly, McNulty, and petitioner joined in a conspiracy to defraud the federal government, in violation of 18 U.S.C. 371. J.A. 17-22. Count 20 identified two objects of the conspiracy: (1) impairment of the efforts of the Internal Revenue Service to ascertain income taxes (the IRS object); and (2) impairment of the efforts of the Drug Enforcement Administration to ascertain forfeitable assets (the DEA object). J.A. 18.

The evidence relevant to Count 20 showed that Beverly held and controlled assets in the names of both McNulty and petitioner. He arranged for McNulty to become (without capital contribution) the majority shareholder of Blacom Corporation, a company that Beverly used to control various properties he acquired through his drug operation. J.A. 65-68. Beverly also placed real estate and a Mercedes Benz automobile that he used in McNulty's name. J.A. 68-69. Following the same modus operandi, Beverly purchased a tavern and an adjoining building in petitioner's name. Petitioner filed tax returns claiming the tavern as her own in order to conceal Beverly's ownership of the business and his underreporting of income. J.A. 69, 106 & n.33. Beverly also purchased a $35,000 Jaguar automobile in petitioner's name, and Beverly and petitioner structured the payments on the car to evade federal reporting requirements for cash payments in excess of $10,000 (26 U.S.C. 6050I). J.A. 70 & n.8, 107. See also J.A. 49-50 (order denying bail pending appeal).

During the trial, petitioner unsuccessfully moved for a severance, arguing that the government had failed to prove that petitioner knew Beverly was a drug dealer or that petitioner was aware of the DEA object of the conspiracy. J.A. 76. At the close of trial, petitioner proposed jury instructions that would have required the jury to find that petitioner knew the object of the conspiracy was to impede the IRS in ascertaining Beverly's taxes. J.A. 76-77. She also asked the court to require the jury to identify, through special interrogatories, whether petitioner had knowledge of the IRS and DEA objects of the conspiracy. The court denied both the proposed jury instructions and the request for special interrogatories. The jury returned a general verdict of guilty against Beverly, McNulty, and petitioner on Count 20. J.A. 77.[1]

2. The court of appeals affirmed petitioner's conviction. The court first found that there was sufficient evidence to convict petitioner for participation in the IRS object of the conspiracy. J.A. 105-109. The court then rejected petitioner's contention that her conviction should be vacated because it was impossible to determine from the general verdict whether the jury had convicted her of conspiring to defraud the IRS, which the government had demonstrated through sufficient evidence, or conspiring to defraud the DEA, which the government had failed to prove. The court explained that when the indictment charges a multiple-object conspiracy, a general verdict can stand as long as there is sufficient evi-

[1] The jury also found Beverly, McNulty, and other defendants guilty of various other offenses. J.A. 55.

dence to support one of the objects of the conspiracy. J.A. 105, 109-118.[2]

SUMMARY OF ARGUMENT

Petitioner argues that a defendant's conviction for a multiple-object conspiracy must be set aside if, as in this case, the evidence is insufficient to show that the defendant had knowledge of one of the objects of the conspiracy. The court of appeals correctly rejected that contention. Petitioner's conviction should be sustained because, as petitioner acknowledges, there was sufficient evidence for a rational trier of fact to find that petitioner joined the conspiracy to defraud the United States and knew that that object would be achieved by impairing the Internal Revenue Service's efforts to ascertain income taxes.

1. This Court has long followed the general rule that when a jury returns a guilty verdict on a substantive count charging several criminal acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged. *United States* v. *Miller*, 471 U.S. 130, 136 (1985); *Turner* v. *United States*, 396 U.S. 398, 420 (1970). Similarly, when a conspiracy count identifies several objects of the conspiracy in the conjunctive, a jury's general verdict of guilty should stand if there is sufficient evidence as to any of the objects. Most courts

[2] The court of appeals affirmed the convictions and sentences of the other defendants. J.A. 54-105, 118. With respect to McNulty's challenge to her conviction on the charge of conspiracy to defraud the government, the court found that the evidence against her was sufficient to establish both the IRS object and the DEA object of the conspiracy. J.A. 98-100. This Court denied Beverly's petition for a writ of certiorari on January 14, 1991. *Beverly* v. *United States*, 111 S. Ct. 766 (1991).

of appeals follow that approach. Only the Third Circuit has consistently held that a conspiracy conviction must be vacated if the government fails to prove all the objects identified in the indictment.

2. The Court's decisions in cases such as *Yates* v. *United States*, 354 U.S. 298 (1957), which have set aside convictions where the jury received incorrect legal instructions as to one of several alternative bases for conviction, do not support petitioner's position. When a trial court incorrectly instructs the jury as to the law, it creates the possibility that a rational jury might convict the defendant based on conduct that is not a crime. That principle does not apply, however, when the jury has been properly instructed and the issue is simply whether the evidence is sufficient to support the conviction. Our judicial system assumes that once a jury is correctly instructed, it is capable of correctly analyzing the evidence. The standard for reviewing jury verdicts is premised on that assumption; reviewing courts do not ask whether the jury in each case reached its verdict in a rational way, but only whether the evidence was sufficient to allow a hypothetical rational jury to find the defendant guilty. Thus, when the evidence is sufficient to convict a defendant on one, but not all, of several theories, the reviewing court's task is at an end, since the jury could rationally have convicted on the theory for which there was sufficient evidence.

3. When the evidence as to one conspirator fails to show that that conspirator shared in every object of the conspiracy, the district court is not required to submit special interrogatories to the jury or give the jury a special instruction with respect to that defendant. To be sure, in many cases the use of special interrogatories can avoid problems arising

from factual or legal infirmities affecting one object of a multiple-object conspiracy charge. For that reason, we believe that in some settings the use of special interrogatories is appropriate and should be encouraged. Nonetheless, the use of special interrogatories can sometimes generate jury confusion, and in a particular case may create more problems than it solves. The decision whether to use special interrogatories in a particular case should therefore be left to the district court's discretion. When a district court decides not to use special interrogatories, the court's decision should not lead to reversal simply because the evidence with respect to a particular defendant turns out to be insufficient as to one of the objects of the conspiracy.

The same principle should apply to the court's decision whether to instruct the jury that certain objects do not apply to certain defendants. Such an instruction can be more confusing than enlightening when several defendants are charged with a single multiple-object conspiracy, particularly when the evidence is sufficient, with respect to some defendants, on all the objects of the conspiracy. As long as the evidence is sufficient to support the jury's verdict on at least one of the objects of the conspiracy, and as long as there is no legal error infecting the jury's verdict, the reviewing court's traditional task is at an end and the jury's verdict should stand.

ARGUMENT

A CONVICTION OF A MULTIPLE-OBJECT CONSPIRACY IS NOT SUBJECT TO REVERSAL BECAUSE THE EVIDENCE IS INSUFFICIENT TO SUPPORT ONE OF THE OBJECTS OF THE CONSPIRACY

A. A Reviewing Court Should Evaluate The Sufficiency Of The Evidence In Multiple-Object Conspiracy Cases Under The Same Rule That Applies In Other Cases

1. This Court has repeatedly emphasized that appellate courts perform a limited function in reviewing jury verdicts. The reviewing court does not "weigh the evidence or * * * determine the credibility of witnesses." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Nor does it attempt to determine how the jury reached its verdict. Rather, the sole question for the court is whether there is sufficient evidence to permit a rational jury to find the defendant guilty. *United States* v. *Powell*, 469 U.S. 57, 67 (1984); *Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979); *Burks* v. *United States*, 437 U.S. 1, 17 (1978).

That principle applies even if the evidence at trial fails to prove all of the allegations in the indictment, as this Court held in *United States* v. *Miller*, 471 U.S. 130 (1985). The indictment in *Miller* charged two types of fraud, while the evidence showed only one.[3] The precise issue in *Miller* was whether the grand jury guarantee of the Fifth Amendment is violated "when a defendant is tried under an indictment that alleges a certain fraudulent scheme but is convicted based on trial proof that supports only a significantly narrower and more limited, though included, fraudulent scheme." 471 U.S. at 131. The Court affirmed the conviction, holding that the verdict was valid as long as the allegations proved at trial were contained within, even if not as broad as, the charge in the indictment. In reaching that conclusion, the Court relied in part on the proposition that when a jury returns a guilty verdict on a count charging several acts in the conjunctive, "the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Miller*, 471 U.S. at 136, quoting *Turner* v. *United States*, 396 U.S. 398, 420 (1970). See also *Crain* v. *United States*, 162 U.S. 625, 634-636 (1896) (citing 19th Century cases and commentary).

The "general rule," *Turner*, 396 U.S. at 420, that a verdict is valid if the evidence establishes any offense charged in the count at issue, applies with no less force in the case of an indictment charging a multiple-object conspiracy. The reviewing court's role in that setting is no different than in the case of an ordinary substantive offense. The court's inquiry in either case is limited to whether the evidence was sufficient to permit a rational jury to find the defendant guilty beyond a reasonable doubt of the crime charged in the indictment.

If petitioner's position were adopted and conspiracies were treated differently from other crimes, reviewing courts would be forced to draw distinctions having no principled basis. Assume, for example, that a defendant is charged with the offense of defrauding an insurer through two means and the offense of conspiring to defraud the insurer through the same two means. *Turner* and *Miller* establish

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[3] The defendant in *Miller* was convicted of mail fraud, 18 U.S.C. 1341, in connection with an insurance claim he made following the burglary of his place of business. The indictment alleged that the defendant defrauded an insurer both by consenting to the burglary and by lying to the insurer about the value of the loss. 471 U.S. at 131-132. The evidence at trial, however, concerned only the latter allegation. *Id.* at 132-133.

that even if the government fails to prove that both means were employed in committing the substantive offense, the conviction would nonetheless stand. In petitioner's view, however, a different rule would apply to conspiracy cases, and the reviewing court would have to set aside the conspiracy conviction if the government's proof failed to prove that both means were among the objects of the conspiracy. There is no logical or doctrinal basis for such a distinction, and this Court should not adopt it.

2. The court of appeals correctly held, in accordance with the principles of *Miller* and *Turner*, and consistently with most circuit court decisions, that a verdict of guilty on an indictment charging a multiple-object conspiracy must be affirmed if the reviewing court finds that the evidence is sufficient as to any one of the objects. J.A. 109-117. The First, Second, Fifth, Eighth, Ninth, and Eleventh Circuits appear to follow the rule that the court of appeals applied in this case. See *United States* v. *Bilzerian*, 926 F.2d 1285, 1302 (2d Cir. 1991); *United States* v. *Johnson*, 713 F.2d 633, 645-646 & n.15 (11th Cir. 1983), cert. denied, 465 U.S. 1081 (1984); *United States* v. *Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *United States* v. *Murray*, 621 F.2d 1163, 1171 (1st Cir.), cert. denied, 449 U.S. 837 (1980); *United States* v. *Phillips*, 606 F.2d 884, 886 n.1 (9th Cir. 1979), cert. denied, 444 U.S. 1024 (1980); *United States* v. *Wedelstedt*, 589 F.2d 339, 341-342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); *United States* v. *James*, 528 F.2d 999, 1014 (5th Cir.), cert. denied, 429 U.S. 959 (1976).

This rule is not a new principle of law. As the Fifth Circuit stated in *James*:

> It has always been the law that where an indictment alleges a conspiracy to commit several offenses against the United States, the charge is sustained by adequate pleadings and proof of conspiracy to commit any one of the offenses.

528 F.2d at 1014, citing *United States* v. *Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Papadakis*, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); *United States* v. *Grizaffi*, 471 F.2d 69, 73 (7th Cir. 1972), cert. denied, 411 U.S. 964 (1973); *McWhorter* v. *United States*, 62 F.2d 829 (5th Cir. 1933); *Christiansen* v. *United States*, 52 F.2d 950 (5th Cir. 1931); *Hogan* v. *United States*, 48 F.2d 516 (5th Cir.), cert. denied, 284 U.S. 668 (1931). Similarly, the Second Circuit, speaking on separate occasions through Judge Friendly and Judge Learned Hand, has held that "where an indictment charged a conspiracy to engage in three offenses and only one was proved, the conviction could still stand." *United States* v. *Dixon*, 536 F.2d 1388, 1401-1402 (1976) (Friendly, J.), citing *United States* v. *Mack*, 112 F.2d 290, 291 (1940) (Hand, J.).[4]

3. Petitioner notes that circuit courts occasionally have departed from the result we urge.[5] For the

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[4] See also *United States* v. *Townsend*, 924 F.2d 1385, 1412-1414 (7th Cir. 1991); *United States* v. *Mowad*, 641 F.2d 1067, 1073-1074 (2d Cir.), cert. denied, 454 U.S. 817 (1981); *United States* v. *Tanner*, 471 F.2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972); *McDonnell* v. *United States*, 19 F.2d 801, 803 (1st Cir.), cert. denied, 275 U.S. 551 (1927); *Moss* v. *United States*, 132 F.2d 875, 877-878 (6th Cir. 1943); *Bailey* v. *United States*, 5 F.2d 437, 438 (5th Cir. 1925); *Kepl* v. *United States*, 299 F. 590, 591 (9th Cir. 1924); 1 J. Bishop, *New Criminal Procedure* § 434 (2d ed. 1913).

[5] See *United States* v. *Garcia*, 907 F.2d 380, 381 (2d Cir. 1990); *United States* v. *Griffin*, 699 F.2d 1102, 1104 n.9 (11th Cir. 1983); *United States* v. *Irwin*, 654 F.2d 671, 680 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States*

most part, however, those departures have proceeded without acknowledgement or analysis of—and in seeming inadvertence to—the prevailing rule. Only the Third Circuit has consistently held that when an indictment alleges several conspiracy objects and predicate offenses, the evidence must be sufficient to prove all of them if the court cannot determine which specific offenses or objects the jury relied upon in reaching its verdict.[6]

The Third Circuit adopted its rule out of concern that where there is "a failure of proof" with respect to one of several alleged objects of the conspiracy, the jury may have based its verdict on the unproved object. See *United States* v. *Tarnopol*, 561 F.2d 466, 474-475 (1977); *United States* v. *Dansker*, 537 F.2d 40, 51 (1976), cert. denied, 429 U.S. 1038 (1977). That reasoning, however, is inconsistent with this Court's decisions in *Miller* and *Turner*, which require only that the reviewing court determine that the evidence is sufficient to justify a rational jury in finding the defendant guilty of the crime charged in the indictment.

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v. *Head*, 641 F.2d 174, 179 (4th Cir. 1981), cert. denied, 462 U.S. 1132 (1983); *Van Liew* v. *United States*, 321 F.2d 664 (5th Cir. 1963).

[6] See *United States* v. *Vastola*, 899 F.2d 211, 228 (RICO, dictum), cert. granted and judgment vacated on other grounds, 110 S. Ct. 3233 (1990); *United States* v. *Zauber*, 857 F.2d 137, 151-152 (1988) (RICO, dictum), cert. denied, 489 U.S. 1066 (1989); *United States* v. *Riccobene*, 709 F.2d 214, 227 (RICO, dictum), cert. denied, 464 U.S. 849 (1983); *United States* v. *Brown*, 583 F.2d 659, 669 (1978) (RICO), cert. denied, 440 U.S. 909 (1979); *United States* v. *Tarnopol*, 561 F.2d 466, 474 (1977) (conspiracy); *United States* v. *Dansker*, 537 F.2d 40, 51 (1976) (conspiracy), cert. denied, 429 U.S. 1038 (1977). See also *United States* v. *Ryan*, 828 F.2d 1010, 1015 (1987) (false statements).

This Court "has long recognized that an indictment may charge * * * the commission of any one offense" —including conspiracy—"in several ways." *Miller*, 471 U.S. at 136. If the reviewing court determines that the evidence is sufficient to permit a jury to find at least one of the several unlawful objects identified in the indictment, then under the traditional standard for reviewing jury verdicts, the evidence is sufficient to establish that element of the crime. Moreover, even if speculation about the actual basis for the verdict were permitted, the majority approach would be consistent with any reasonable hypothesis regarding the actual basis for the jury's verdict. It would be unreasonable to assume that the jury would choose to reject the sufficiently proved object and rely on the insufficiently proved object instead.

4. The same principles apply when, as in this case, the evidence on the second object of the conspiracy is not insufficient as to all the defendants, but only as to one. It is undisputed that the evidence at trial was sufficient as to defendants Beverly and McNulty with respect to both the IRS object and the DEA object of the conspiracy. This is therefore not a case in which the entire conspiracy was narrower than that charged in the indictment. Rather, it is a case in which the conspiracy was as broad as charged, but in which one of the conspirators was unaware of one of the means by which the fraudulent purpose of the conspiracy was to be achieved.

The disparity in the evidence as to petitioner and the other conspirators does not exonerate petitioner from liability for her membership in the conspiracy, nor does it suggest that she was a member of a conspiracy different from the one charged in the indictment. It is a familiar principle of conspiracy law that a

jury may properly find a particular defendant guilty of a charged conspiracy without finding that the defendant was aware of or contributed to all the alleged objects of the conspiracy.[7]

This Court's analysis in *Berger* v. *United States*, 295 U.S. 78 (1935), is enlightening on that point. The question in *Berger* was whether Berger's conviction under a conspiracy indictment could be sustained where the evidence at trial showed that Berger was not a party to every aspect of the charged conspiracy. In analyzing Berger's claim, the Court suggested a hypothetical situation where, rather than

[7] See, *e.g.*, *United States* v. *Rapp*, 871 F.2d 957, 964-965 (11th Cir.) (defendants convicted of conspiracy based on agreement to further two objectives of that conspiracy, even though evidence did not show their knowledge of another purpose of the conspiracy), cert. denied, 110 S. Ct. 233 (1989); *United States* v. *Adams*, 759 F.2d 1099, 1114 (3d Cir.) ("[k]nowledge of all the particular aspects, goals, and participants of a conspiracy * * * is not necessary"), cert. denied, 474 U.S. 906 (1985); *United States* v. *Williams*, 737 F.2d 594, 615 (7th Cir. 1984) ("a conspirator need not know the details * * * or every objective of the conspiracy"), cert. denied, 470 U.S. 1003 (1985); *United States* v. *Escalante*, 637 F.2d 1197, 1200 (9th Cir.), cert. denied, 449 U.S. 856 (1980) ("In order to be a co-conspirator, one need not know all the purposes of and participants in the conspiracy."); *United States* v. *Gleason*, 616 F.2d 2, 16 (2d Cir. 1979) ("To be convicted as a member of a conspiracy, a defendant need not know every objective of the conspiracy."), cert. denied, 444 U.S. 1082 (1980); *United States* v. *Bolts*, 558 F.2d 316, 325 (5th Cir.) ("Determining whether [a defendant] agreed to a particular objective is thus unnecessary in a case involving a conspiracy with multiple and related criminal objecitves."), cert. denied, 434 U.S. 930 (1977); *United States* v. *Rodriguez*, 585 F.2d 1234, 1249 (5th Cir. 1978) ("the government need prove only that a conspirator agreed to one of the many objectives charged"), aff'd on other grounds, 450 U.S. 333 (1981).

charging one conspiracy, the indictment charged two smaller conspiracies, each having a different object. The Court observed that a defendant could properly be convicted on one count of conspiracy based on evidence at trial that established his participation in one of the smaller conspiracies. It concluded that the "situation supposed and that under consideration" did not "differ in real substance." *Id.* at 83.

The same analysis can be applied to this case. As in *Berger*, even if petitioner were regarded as having been a member of a narrower conspiracy than the one charged in Count 20, the variance between the charge and the proof would not affect her in any substantial way. There was ample evidence to convict her of conspiracy based on the IRS object. In addition, there was little or no risk of jury confusion because of the evidence against the other defendants with respect to concealment of assets from the DEA. *A fortiori*, petitioner was not prejudiced by being tried together with her co-defendants for a single multiple-object conspiracy, even though the evidence established her participation with respect to only one of the two objects of that conspiracy. The absence of any risk of prejudice is particularly clear in this case, where the prosecutor explicitly advised the jury that with respect to petitioner the government was relying entirely on the sufficiently proved object (the IRS object) and not on the other charged object (the DEA object) to establish petitioner's participation in the conspiracy. See Tr. 3571.

5. The position we urge in this case, besides being consistent with the prevailing legal rule, ensures the efficient use of limited trial resources. The federal government frequently prosecutes multiple-object conspiracies involving complex factual situations. It is

not unusual in such cases for a reviewing court to conclude that the evidence to support the conspiracy is sufficient, but the evidence with regard to one of the subsidiary objects is not. Under petitioner's approach, every case of that sort would have to be retried.

The costs that retrying these cases would impose on the prosecution, the defense, the courts, and witnesses would be substantial. The benefits, by contrast, would be minimal. As the Seventh Circuit recently explained:

> It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance—remote, it seems to us—that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.

United States v. *Townsend*, 924 F.2d at 1414. Little stands to be gained in questioning a jury verdict when the trial is properly conducted, the jury is correctly instructed on the law, and there is adequate evidence to support the jury's verdict. Indeed, a retrial, which inevitably must be conducted at a later date when witnesses or physical evidence may have disappeared and memories may have faded, would in many instances severely compromise the truth-finding process.

B. The Decisions Of This Court Requiring A Reviewing Court To Vacate A Conviction If The Indictment Or Jury Instructions Are Legally Flawed Do Not Govern This Case

1. Petitioner argues that the court of appeals' ruling is inconsistent with this Court's decisions in a line of cases setting aside verdicts because of legal

flaws in the indictments or jury instructions. See *Yates* v. *United States*, 354 U.S. 298 (1957); *Cramer* v. *United States*, 325 U.S. 1, 36 n.45 (1949); *Williams* v. *North Carolina*, 317 U.S. 287, 291-292 (1942); *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931). As the court of appeals correctly recognized, however, those cases all deal with the situation where the jury acted under a mistaken understanding of the law. They are not applicable to the situation where the jury is correctly instructed on the legal standards, but the government has failed, in some respect, to prove the factual elements of its case. See J.A. 110 & n.34.

Yates illustrates the distinction. The defendant was charged under the Smith Act, 18 U.S.C. 2385, with participating in a conspiracy to advocate the violent overthrow of the government and to organize a society or group for that purpose. 354 U.S. at 300. After determining that the district court incorrectly instructed the jury as to the latter object, the Court vacated the conviction, stating:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

Id. at 312. As the court of appeals explained, *Yates* was a case in which the jury, incorrectly instructed on the law, might have convicted the defendant for engaging in conduct that was not a crime. That rule does not apply when the reviewing court determines that the jury was properly instructed, and when the only flaw is a lack of evidence as to one of the alleged objects. In that setting, the principle set forth in *Turner* controls: the jury is presumed to have cor-

rectly evaluated the evidence and to have convicted the defendant on the theory for which there was sufficient evidence.

The same distinction explains *Stromberg*, *Williams*, and *Cramer*. In *Stromberg*, the defendant was convicted under a California statute prohibiting the display of a red flag in a public place as: (a) a symbol of opposition to organized government; (b) an invitation to anarchistic action; or (c) an aid to seditious propaganda. See 283 U.S. at 361. The Court concluded that the first clause of the statute violated the First Amendment, *id.* at 369, and vacated the conviction because "the conviction * * * may have rested on that clause exclusively," *id.* at 370.

In *Williams*, the defendants were convicted of the North Carolina crime of bigamous cohabitation. The jury was instructed that it could disregard the defendants' precohabitation Nevada divorce decrees on the ground either that North Carolina did not recognize decrees based on substituted service or that the decrees were procured through fraud. See 317 U.S. at 290-291. This Court determined that the Full Faith and Credit Clause required North Carolina to recognize divorce decrees based on substituted service. It therefore vacated the convictions, observing that the verdict was "a general one," and that it "follows here as in *Stromberg* v. *California*, * * * that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained." 317 U.S. at 291, 292.

In *Cramer*, the defendant was charged with treason based on several acts, including his post-arrest false statements to the FBI. The Court observed:

> The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient [citing *Stromberg* and *Williams*].

325 U.S. at 36 n.45. The Court questioned whether lying to the FBI under the circumstances could legally constitute treason, but the Court found no need to reach that issue because it reversed on the ground that other charged acts of treason did not, as a matter of law, constitute treason. *Id.* at 36 n.45, 37-40. Thus, the Court's statements in *Stromberg*, *Williams*, and *Cramer*, that "insufficient" multiple-object verdicts must be set aside, were all made in the context of *legal* insufficiency—that is, where the jury may have found that the defendant committed the acts, but those acts, as a matter of law, did not constitute crimes.[8]

2. This Court's decisions in *Yates*, *Cramer*, *Williams*, and *Stromberg* do not explicitly distinguish between legal and factual insufficiency. Nevertheless,

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[8] The court of appeals' opinion in *Cramer* makes it quite clear that the issue in that case was regarded as one of *legal* as opposed to *evidentiary* insufficiency. See *United States* v. *Cramer*, 137 F.2d 888 (2d Cir. 1943). The court of appeals distinguished the *Cramer* case from cases in which multiple overt acts are submitted to the jury and the conviction is upheld as long as the evidence is sufficient with respect to any one of them. In the latter class of cases, the court observed, 137 F.2d at 893,

> it can be presumed upon a conviction that the jury has properly fulfilled its time-honored function of weighing the evidence and that its finding of guilt was based on the one sufficiently proved overt act. But the jury was never intended, nor, indeed, is it properly equipped, itself to determine the legal sufficiency, as distinguished from the evidentiary sufficiency, of the overt acts alleged.

the Court's statements in those cases "must be taken in the context in which [they were] made," *Air Courier Conference* v. *American Postal Workers Union*, 111 S. Ct. 913, 920 (1991), and the context was that of legal insufficiency. Moreover, the distinction between legal and factual insufficiency is solidly grounded in the logic of those decisions. Indeed, it reflects two well-established and complementary premises concerning the jury's discharge of its functions.

Our judicial system presumes that jurors follow the trial judge's instructions on the law. See *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987). For that reason, when a judge incorrectly instructs the jury as to the law, and thereby creates a significant risk that a jury might have convicted the defendant based on conduct that is not a crime, the defendant is entitled to a new trial. Our judicial system also presumes, however, that once the jury is properly instructed, it is capable of correctly analyzing the evidence. See *Duncan* v. *Louisiana*, 391 U.S. 145, 157 (1968). Thus, where the evidence is sufficient to convict the defendant on one but not all of several theories, the reviewing court is justified in concluding that the jury convicted on the theory for which there was sufficient evidence.

Petitioner suggests that there is no distinction between factual and legal insufficiency, because a reviewing court examines the sufficiency of the evidence "as a matter of law." That argument, we submit, misses the point. A reviewing court may invalidate a jury's guilty verdict if it concludes, as a matter of law, that the evidence is insufficient to support the verdict. When a court addresses that issue, "the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution,

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. Applying that standard, a reviewing court should not invalidate a jury verdict if the indictment alleges that a conspiracy has two or more objects, and there is sufficient evidence to support one of those objects. In that situation, a rational trier of fact could properly find the essential elements of the crime beyond a reasonable doubt.

In short, there is a sound basis for applying the *Yates* rule in situations involving legal, but not factual, insufficiency. As the Seventh Circuit recently explained:

> It is consistent with our conception of the jury's role, and to reject it would force us, by dint of logic, at any rate, to consider radically revising that role. That is not, we believe, what the Supreme Court had in mind when it created the [*Yates*] rule.

United States v. *Townsend*, 924 F.2d at 1414. The court of appeals correctly determined in this case that the evidence was sufficient to establish that petitioner participated in the IRS object of the conspiracy. That determination is sufficient to sustain petitioner's conviction.

3. Petitioner relies on statements contained in three of this Court's other decisions that, petitioner asserts, support application of the *Yates* rule to cases of factual insufficiency. See *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983); *Haupt* v. *United States*, 330 U.S. 631, 641 & n.1 (1947); *American Medical Ass'n* v. *United States*, 317 U.S. 519, 531-533 (1943). In *Zant*, this Court reinstated the defendant's sentence, while in *Haupt* and *American Medical Ass'n* the Court affirmed the convictions under review. Thus,

the statements that petitioner cites are dicta as to the issue presented here. Moreover, only in the *Haupt* case did the Court's statement provide any support for petitioner's position that reversal is required when one of several objects is found to suffer from factual, as opposed to legal, insufficiency, and even that statement is distinguishable on the basis of the facts of the case from which it arose.

In *Zant*, the respondent argued that, under *Stromberg*, a death sentence must be set aside if one of several statutory aggravating circumstances underlying the jury verdict is determined to be unconstitutionally vague. 462 U.S. at 866-868, 880. This Court recited the *Stromberg* rule, but determined that *Stromberg* did not require setting aside the sentence, "because the jury did not merely return a general verdict stating that it had found at least one aggravating circumstance. The jury expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty." *Id.* at 881. Thus, this Court's statements in *Zant*, which were addressed to the effect of a legally insufficient ground for imposing the sentence (unconstitutional vagueness), are consistent with our understanding of the *Stromberg/Yates* line of cases.

In *American Medical Ass'n*, the defendants were convicted on an indictment that charged a single Sherman Act conspiracy having five anticompetitive purposes. 317 U.S. at 519. The defendants contended that the indictment effectively "charges five separate conspiracies defined by their separate and recited purposes" and that "they were entitled to have the trial court rule upon the sufficiency in law of each of these charges and, as this was not done, the general verdict cannot stand." *Id.* at 531. The defendants further contended that "the last two purposes specified cannot constitute violations of [the Sherman Act] and the jury should have been so instructed." *Ibid.* The Court rejected the defendants' claim, stating, *ibid.*:

> If in fact the indictment charges a single conspiracy to obstruct or restrain the business of Group Health, and if the recited purposes are really only subsidiary to that main purpose or aim, or merely different steps toward the accomplishment of that single end, and if the cause was submitted to the jury on that theory, these contentions fail.

Rather than helping petitioner, the Court's discussion of that point is quite damaging to her argument. The effect of the quoted passage is that, at least where a single conspiracy offense is charged, and where the listed purposes of the conspiracy are properly characterized as "subsidiary to" or "steps toward the accomplishment of" the goal of the conspiracy, the conviction could not be challenged on the ground that some of those subsidiary purposes or means were invalid.

The analogy to this case is a close one. Count 20 of the indictment charged a single conspiracy to defraud the United States. That unlawful end, the indictment alleged, was to be achieved by concealing assets from the IRS and the DEA. Under the *American Medical Ass'n* case, any failure of proof as to one of those means of effecting the purpose of the conspiracy would not affect the validity of the jury's verdict as long as the evidence was sufficient to show a violation of the single offense charged—conspiring to defraud the United States.

Moreover, the issue in *American Medical Ass'n*, as in the other cases relied on by petitioner, was one of legal sufficiency. See 317 U.S. at 533 ("The petitioners in effect challenge the sufficiency in law of the

indictment. They hardly suggest that if the pleading charges an offense there was no substantial evidence of the commission of the offense."). *American Medical Ass'n* therefore provides no support at all for petitioner's challenge to her conviction.

In *Haupt*, the defendant sought reversal of his conviction for treason on the ground that the government failed to prove that the defendant gave assistance or comfort to enemy agents. 330 U.S. at 632, 634-635. The Court concluded that in *Haupt*, unlike in *Cramer*, there was no question that the charged acts were sufficient as a matter of law to constitute treason. 330 U.S. at 635. In addition, it concluded that the evidence was sufficient to prove each of the acts submitted to the jury. *Id.* at 636-644. Accordingly, the Court expressly declined to "reach the question whether the conviction could stand on some sufficiently proven acts if others failed in proof." *Id.* at 640-641.

Although the Court did not reach that issue, it suggested in an accompanying footnote:

> As the acts were here pleaded in a single count, and the jury were instructed that they could convict on any one, we would have to reverse if any act were insufficient or insufficiently proved. *Cf. Stromberg* v. *California*, 283 U.S. 359, 368; *Williams* v. *North Carolina*, 317 U.S. 287, 292, and *Cramer* v. *United States*, *supra*.

Haupt, 330 U.S. at 641 n.1. We recognize that the Court's passing footnote reference to an "insufficiently proved" object supports petitioner's argument. That reference, however, is not controlling here because it was a mere "dictum unnecessary to the decision in that case." *McDaniel* v. *Sanchez*, 452 U.S. 130, 141 (1981). As Chief Justice Marshall explained 170 years ago:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered to its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821). See also *Third National Bank* v. *Impac Limited, Inc.*, 432 U.S. 312, 319 n.9 (1977); *Wright* v. *United States*, 302 U.S. 583, 593-594 (1938); *Williams* v. *United States*, 289 U.S. 553, 568 (1933). That maxim holds especially true in this case. As we have explained, the rule is settled in non-conspiracy cases that a "verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Miller*, 471 U.S. at 136, quoting *Turner*, 396 U.S. at 420. The *Haupt* dictum is inconsistent with that settled rule. That isolated dictum, which did not arise in a conspiracy case and provides no answer to the logic of the court of appeals' analysis in this case, should not serve as the basis for overturning the *Miller/Turner* rule or creating a special "conspiracy exception" to that rule.

In any event, the dictum in *Haupt* can be distinguished in light of the context in which it arose, even if that dictum is correct as applied to substantive offenses such as those involved in *Haupt* itself. Under the law of treason, each overt act in a count charging

treason in effect constitutes a separate substantive violation. See *Cramer* v. *United States*, 325 U.S. at 34-35. *Haupt* involved multiple alleged overt acts of treason, all of which were charged together in a single count. The count could thus be said to be duplicitous, and to raise concerns about which of the several substantive offenses charged in that count the jury found the defendant to have committed.[9] In this case, by contrast, there was only a single conspiracy charged in Count 20 of the indictment, even though the conspiracy was alleged to have several objectives. Because Count 20 charged only a single offense, it could not be characterized as duplicitous, and there could be no doubt about what offense the jury found petitioner to have committed. Therefore, as in the *American Medical Ass'n* case, there is no reason for concern that the jury may have found petitioner guilty of an offense for which the evidence was insufficient.[10]

[9] The same analysis serves to distinguish the cases holding that when multiple specifications of perjury or obstruction of justice are charged in a single count, the evidence must be sufficient as to each specification in order for the conviction on that count to be upheld. See *United States* v. *Natelli*, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976); *United States* v. *Berardi*, 675 F.2d 894 (7th Cir. 1982). Because each specification constitutes a separate offense, the prosecution can avoid that problem by charging each offense in a separate count.

[10] In this respect, this case resembles *Schad* v. *Arizona*, No. 90-5551, which is currently pending before this Court. The issue in *Schad* is whether the jury must be unanimous with respect to all possible means that a defendant may have used to commit a charged offense. In our view, unanimity is not required with respect to the means used to commit an offense; a jury is required to be unanimous only with respect to whether the defendant committed the offense charged. Therefore, as long as a single count charges only a single offense, unanimity is required only with respect to the issue of guilt or innocence on that count. Just as a general unanimity charge is adequate to ensure the requisite unanimity among the jurors when a single offense is charged in a particular count (regardless of the alternative means alleged in that count), a general reasonable doubt instruction is adequate to ensure the proper approach to weighing the evidence when a single conspiracy offense is charged in a single count (even if the count alleges multiple objects of the conspiracy).

C. The District Court Was Not Required To Use Special Interrogatories or Special Jury Instructions To Focus The Jury's Attention On Petitioner's Role In The Conspiracy

Petitioner argues that the problems resulting from insufficiency in one object of a multiple-object conspiracy can often be avoided by the use of special interrogatories, in which the jury is directed to indicate which objects of the conspiracy it found to have been proved.[11] We agree that special interrogatories can be a valuable tool in cases such as conspiracy or RICO prosecutions where there is doubt as to the legal validity of a particular object or predicate act. See, *e.g.*, *United States* v. *Aguilar*, 883 F.2d 662, 690-691 (9th Cir. 1989), cert. denied, 111 S. Ct. 751 (1991); *United States* v. *Coonan*, 839 F.2d 886 (2d Cir. 1988); *United States* v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984). The government often proposes the use of special in-

[11] While the term "special verdict" is sometimes used interchangeably with the term "special interrogatory," the terms have different meanings in civil practice. A "special verdict" is used to elicit findings by the jury in the absence of a general verdict, see Fed. R. Civ. P. 49(a), while "special interrogatories" are used in conjunction with a general verdict, see Fed. R. Civ. P. 49(b).

terrogatories in such cases in order to avoid the need for a retrial if one predicate act or object turns out to have a legal flaw. See, *e.g.*, *United States* v. *Boffa*, 688 F.2d 919 (3d Cir. 1982), cert. denied, 465 U.S. 1066 (1984); *United States* v. *Palmeri*, 630 F.2d 192, 202-203 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *O'Looney*, 544 F.2d 385, 392 (9th Cir.), cert. denied, 429 U.S. 1023 (1976). But the use of special interrogatories is not always suitable, and this Court and others have discouraged routine use of the practice. See *Stein* v. *New York*, 346 U.S. 156, 178 (1953) ("no general practice of these techniques [special verdicts and interrogatories] has developed in American criminal procedure"); *United States* v. *Spock*, 416 F.2d 165, 180-182 (1st Cir. 1969); *United States* v. *Wilson*, 629 F.2d 439, 443 (6th Cir. 1980); *United States* v. *James*, 432 F.2d 303, 307-308 (5th Cir. 1970), cert. denied, 403 U.S. 906 (1971); *Gray* v. *United States*, 174 F.2d 919 (8th Cir.), cert. denied, 338 U.S. 848 (1949).

The proper course, in our view, is to leave to the discretion of the district courts the decision whether to use special interrogatories in a particular case. See *United States* v. *Ruggiero*, 726 F.2d at 927-928 (Newman, J., concurring in part and dissenting in part). In some cases, special interrogatories can be very beneficial in facilitating subsequent review of the verdict and can be used without running an undue risk of confusing the jury or dictating the course of its deliberations. That is particularly true if the court submits the special interrogatories to the jury after the general verdict has been returned. See *United States* v. *Desmond*, 670 F.2d 414, 418 (3d Cir. 1982).

In other cases, however, a district court should be permitted to decline to use special interrogatories, even in cases involving multiple predicate acts or multiple objects of a conspiracy. The problem is that special interrogatories, especially if submitted to the jury prior to the general verdict, can sometimes result in jury confusion and may unduly focus attention on a particular charge or a particular defendant, as this case illustrates.

In this case, there was ample evidence as to both the DEA objective and the IRS objective with respect to defendants Beverly and McNulty. A special interrogatory with respect to petitioner alone and with respect to Count 20 alone would give that count and petitioner a special status that would be likely to confuse the jurors, who would be left to speculate why, of all the counts and defendants, they were being given a special interrogatory with respect to only one defendant on only one count.

Similarly, a special instruction regarding petitioner's role in the offense charged in Count 20, of the sort proposed by petitioner, J.A. 39-42, would have singled out petitioner for special treatment by the jury in a way that could well have created jury confusion. Although the evidence as to petitioner was sufficient only as to the IRS objective, that did not mean that she was not a member of the conspiracy described in Count 20, or that the conspiracy that she joined did not extend to the concealment of assets from the DEA. It simply meant that petitioner was not a party to one aspect of the agreement. Yet that is a common enough phenomenon in conspiracy law; a conspirator is fully liable under the law of conspiracy even if he does not expressly agree upon, or even is unaware of, all the objects of the conspiracy. As we have noted, it is a familiar principle of the law of

conspiracy that the government "does not have to prove that the accused knew every objective of the conspiracy, every detail of the scheme's operation, or the identity of every co-conspirator." *United States* v. *Wiley*, 846 F.2d 150, 153-154 (2d Cir. 1988).

In this case, the jury could not have been misled about the government's position regarding the DEA objective. The prosecutor clearly explained to the jury during her rebuttal summation that the government's theory was that petitioner had conspired to conceal assets from the IRS. See Tr. 3571. There was therefore no significant likelihood that the jury would convict petitioner based on the DEA objective, on which there was no evidence, rather than the IRS objective, on which the evidence was ample. Under these circumstances, the district court cannot be said to have abused its discretion by declining to give the jury special interrogatories or special instructions regarding petitioner's awareness of each object of the conspiracy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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